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No. 02-682

In the Supreme Court of the United States

VERIZON COMMUNICATIONS INC.,

Petitioner,

v.

LAW OFFICES OF CURTIS V. TRINKO, L.L.P.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF AMICUS CURIAE OF BELLSOUTH CORPORATION, SBC COMMUNICATIONS INC., AND UNITED STATES TELECOM ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether allegations that an incumbent telecommunications carrier did not sufficiently assist competing carriers state a claim under the antitrust laws.

2. Whether customers of competing carriers have standing under the antitrust laws to raise such a claim.

3. Whether Congress intended that such allegations be resolved through the remedial framework of the Telecommunication Act of 1996 rather than antitrust litigation.

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INTEREST OF THE AMICI CURIAE

Amici BellSouth Corporation and SBC Communications Inc. are incumbent local exchange carriers ("ILECs") in their respective regions. Amicus United States Telecom Association is the leading trade association for the local telephone industry. Founded more than a century ago, USTA represents some 670 facilities-based incumbent wireline providers of local telephone service, which operate more than 80% of the country's local access lines.

BellSouth and SBC have entered into thousands of agreements with competing local exchange carriers ("CLECs") pursuant to the Telecommunications Act of 1996 ("1996 Act"). Because the parties to these agreements are competitors, disputes frequently arise between them. Most of these disputes are resolved informally or, where necessary, before the state commissions that oversee inter-carrier relations. The decision below, holding that a CLEC's customer has standing to raise and has properly alleged a monopolization claim by asserting that the incumbent carrier did not sufficiently assist competitors, dramatically expands the scope of the antitrust laws. This Court's intervention is needed to uphold proper limits on antitrust law and standing and to give effect to the administrative framework prescribed by Congress in the 1996 Act.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

The decision below reflects a sharp inter-circuit split over the scope of federal antitrust law and its applicability

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[1] This brief was not written in whole or in part by any party and no one other than the amici made a monetary contribution to its preparation. The written consents of the parties to the filing of this brief have been filed with the clerk.

to recurring, complex, and highly technical disputes arising within the framework of the 1996 Act. By overriding established limits on antitrust liability and authorizing any telephone customer to bypass Congressionally designated regulators and initiate a treble-damages antitrust suit, the Second Circuit has unleashed a new wave of burdensome antitrust litigation on the federal courts. Its expansion of the previously narrow "essential facilities" and "monopoly leveraging" doctrines has adverse implications both for the telecommunications industry and for all sectors of the American economy.

In the 1996 Act, Congress ended 12 years of unhappy experience with judicial oversight of the telephone industry under the AT&T divestiture decree. It did so by creating an unprecedented regulatory regime that calls on regulated entities to provide extensive affirmative assistance to competing firms. Under the Act, ILECs are required to assist competitors both in entering the local telephone business and in taking away the ILECs' own customers. In particular, the Act requires ILECs to "share their own facilities" with competitors at cost and to provide wholesale services at deep discounts. *Verizon Communications Inc.* v. *FCC*, 122 S. Ct. 1646, 1654 (2002). This was a fundamental departure from existing antitrust law.

To implement these new duties, the 1996 Act created an elaborate system of compulsory negotiation and arbitration, with enforcement by state and federal administrators. In direct conflict with *Goldwasser* v. *Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000), the court below held that alleged violations of these new duties—even if already remedied pursuant to the administrative scheme of the 1996 Act—may give rise to class action consumer lawsuits under the antitrust laws. Pet. App. 1a-39a. The Eleventh Circuit has also permitted a CLEC's

antitrust claim to go forward in a similar context. *Covad Communications Co.* v. *BellSouth Corp.*, 299 F.3d 1272 (11th Cir. 2002). Conflicts over these issues have produced discrepant results at the district court level as well.[2]

The class action bar's response to the decision below has been swift and dramatic. "[A] plaintiffs' bar that has already looted the tobacco and asbestos industries is now salivating at the prospect of feeding off the Bells." Wall St. J., Aug. 23, 2002, at A12. At least 20 class action lawsuits already have been filed in district courts in the Second Circuit—11 against Verizon and 9 against SBC. District courts in New York also have relied on the decision below to mandate burdensome new sharing obligations in antitrust cases involving the cable and software industries.

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[2] Compare *Covad Communications Co.* v. *Bell Atl. Corp.*, 201 F. Supp. 2d 123, 130 (D.D.C. 2002) (agreeing with *Goldwasser* that ILEC's alleged failure to affirmatively assist competitors was "outside the parameters of pre-existing antitrust law"); *Cavalier Tel., LLC* v. *Verizon Va., Inc.*, 208 F. Supp. 2d 608 (E.D. Va. 2002) (same); *Verizon N.J., Inc.* v. *Ntegrity Telecontent Servs., Inc.*, 219 F. Supp. 2d 616 (D.N.J. 2002) (same); *MGC Communications, Inc.* v. *BellSouth Telecommunications, Inc.*, 146 F. Supp. 2d 1344 (S.D. Fla. 2001) (same); *Supra Telecommunications & Info. Sys., Inc.* v. *BellSouth*, No. 99-1706 (S.D. Fla. June 8, 2001) (same); *Intermedia Communications, Inc.* v. *BellSouth Telecommunications, Inc.*, 173 F. Supp. 2d 1282 (M.D. Fla. 2000) (same); *Building Communications, Inc.* v. *Ameritech Servs., Inc.*, No. 97-CV-76336 (E.D. Mich. June 21, 2001) (same), with *Ohio Bell Tel. Co.* v. *CoreComm Newco, Inc.*, 214 F. Supp. 2d 810 (N.D. Ohio 2002) (disagreeing with *Goldwasser* and holding that an ILEC's alleged failure to affirmatively assist competitors may support an antitrust claim); *Davis* v. *Pacific Bell*, 204 F. Supp. 2d 1236 (N.D. Cal. 2002) (same); *Stein* v. *Pacific Bell*, 173 F. Supp. 2d 975 (N.D. Cal. 2001) (same); *Metronet Servs. Corp.* v. *Qwest Corp.*, 2001 WL 765167 (W.D. Wash. Apr. 16, 2001) (same).

See Pet. 29. The Eleventh Circuit's *Covad* decision has spawned 8 more class action suits against BellSouth. Discovery and trial in cases that withstand dismissal motions will cost defendant carriers tens of millions of dollars and impose enormous burdens on the courts. The judgments in such cases inevitably will be inconsistent with or duplicative of the determinations made by federal and state regulators, in whom Congress vested authority.

The Seventh Circuit held in *Goldwasser* that the antitrust laws may not be invoked to generate a supplementary, common-law body of network sharing obligations and affirmative assistance to rivals. That court explained that antitrust law has *never* required such assistance, that expansion of the law to embrace these duties would improperly overlap and conflict with the new regulatory scheme, and hence that antitrust claims invoking such duties must be dismissed.

By sustaining a consumer class action complaint of the very kind dismissed in *Goldwasser*, the Second Circuit has radically extended the scope of federal antitrust litigation and conferred standing on millions of individual consumers to raise these newly-minted claims. It broadly sanctioned monopolization suits under the previously narrow "essential facilities" doctrine, inviting juries to require affirmative assistance of a kind that has been the exclusive province of regulatory law. It also rejected the position of other circuits by reviving a discredited version of the monopoly leveraging doctrine, one that forbids firms with lawfully obtained dominance in a wholesale market from using that position to obtain a "competitive advantage" in a retail market. Such open-ended criteria would enable antitrust juries to cast aside the standards and requirements of the 1996 Act and fashion their own telecommunications policies under the Sherman Act's generalized "rule of reason."

Nothing in the 1996 Act suggests that Congress ever intended to have the Act's novel and far-reaching duties serve as a baseline from which antitrust juries may add even more regulatory obligations and enforce them by treble-damage awards. To the contrary, Congress flatly prohibited such expansion of antitrust. The Act expressly provided that its newly articulated administrative standards would not "modify" or otherwise extend the federal antitrust laws, and it removed the AT&T divestiture litigation from the federal district courts and entrusted inter-carrier disputes to the FCC and state regulators in deference to their administrative expertise. See 110 Stat. 56, 143, § 601(a), (b), reprinted as notes to 47 U.S.C. § 152. The 1996 Act thereby replaced the 12 years of "government by consent decree" that followed the AT&T divestiture, under which Judge Harold Greene was required to resolve complex and recurring disputes between telephone carriers. H.R. Conf. Rep. No. 104-458, at 198-201 (1996). The Second Circuit's disregard of these statutory mandates permits multiple antitrust juries to supersede the new administrative scheme.

Congress intended disputes among rival carriers to be resolved through good faith negotiation and arbitration under state commission supervision and legal standards specified by Congress, the FCC, and the state PSCs. Within this comprehensive framework, carriers have negotiated thousands of interconnection and resale agreements specifying their rights and obligations, many of which require resolution of disputes through ADR proceedings and specify sanctions for breach. The decision below renders all this for naught. Any dissatisfied consumer may take such disputes to court and demand a jury award of treble damages, even if the directly affected carriers have resolved their differences to their complete satisfaction, as AT&T and Verizon did here and as

Congress intended. The practical result is that lay juries will be invited to second-guess expert agencies with regard to complex regulatory policy issues they are ill-equipped to resolve, and to impose duplicative damage awards for violations already remedied (as here, by a $10 million award to AT&T and other competing carriers and a $3 million award to the government).

Relations between the competitor-parties to the thousands of existing inter-carrier agreements are predictably fraught with disagreements over a host of technical details—ranging from the terms of equipment collocation to the price, quality, and speed of unbundling network elements and processing customer orders. If every such dispute is fair game for a consumer antitrust class action, as the court below held, the federal judiciary will be swamped with such claims for decades to come. Congress did not intend that result.

I. THE FEDERAL COURTS ARE DEEPLY DIVIDED OVER THE ISSUES RAISED IN THE PETITION.

The decision below squarely conflicts with the Seventh Circuit's decision in *Goldwasser*. As the court below recognized, the consumer plaintiffs in *Goldwasser* and *Trinko* raised "similar allegations of monopolistic conduct" by an ILEC in its dealings with competing carriers. Pet. App. 31a. But the Second Circuit, unlike the Seventh Circuit, refused to dismiss the complaint.

Whereas the Seventh Circuit ruled that an ILEC's failure to share its network with rivals does not amount to an antitrust violation because such sharing is not an antitrust duty (222 F.3d at 399-400), the Second Circuit ruled that such allegations are sufficient to state an antitrust claim under the essential facilities and monopoly leveraging doctrines. Pet. App. 29a-30a. Whereas the

Seventh Circuit deemed the essential facilities theory inapplicable because the 1996 Act's remedial procedures provide rivals with ready means of access to an ILEC's facilities (222 F.3d at 401), the Second Circuit deemed the Act's inter-carrier remedial procedures irrelevant to essential facilities claims by consumers. Pet. App. 35-36a. Whereas the Seventh Circuit deemed it more appropriate to adjudicate such allegations under the "specific legislation" directed to inter-carrier conduct than under the more "general antitrust laws" (222 F.3d at 401), the Second Circuit rejected the notion that this "specific legislation" had any bearing on the applicability of "the general antitrust laws." Pet. App. 35a. Whereas the Seventh Circuit found that such antitrust suits "could easily conflict" with administrative rulings under the 1996 Act (222 F.3d at 401), the Second Circuit found it "unlikely that allowing antitrust suits would substantially disrupt the regulatory proceedings mandated by the Telecommunications Act." Pet. App. 36a.

The incompatible results in *Goldwasser* and this case are especially striking because the *Goldwasser* complaint was considerably more detailed than respondent's complaint. The consumer plaintiffs in *Goldwasser* alleged that Ameritech controlled "essential facilities" and engaged in "20 specific exclusionary or monopolistic practices." 222 F.3d at 394. By contrast, respondent's complaint alleged only one exclusionary or monopolistic practice (delays in filling orders for competitors' customers), supplemented by a boilerplate allegation that Verizon "ma[de] it difficult for its competitors to provide service." Pet. App. 6a-7a. In the Seventh Circuit's view, the complaint had to be dismissed because, no matter how many allegations it contained, no set of facts could overcome the settled antitrust principle that monopolists have no antitrust duty "affirmatively to help their

competitors." 222 F.3d at 398. The Second Circuit, to the contrary, opined that even the token allegations in respondent's complaint were sufficient to state a claim under the Sherman Act. Pet. App. 30-31a.

In addition to the essential facilities theory, the Second Circuit relied on a version of monopoly leveraging, originally propounded in *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 276 (2d Cir. 1979), which makes unlawful a firm's use of its market power in one market to obtain a "competitive advantage" in a second market. The decision below has deepened an inter-circuit conflict over whether that theory can support a Section 2 claim.

Several courts of appeals have rejected the *Berkey Photo* leveraging theory. See *Fineman* v. *Armstrong World Indus., Inc.*, 980 F.2d 171, 206 (3d Cir. 1992); *Alaska Airlines* v. *United Airlines*, 948 F.2d 536, 547 (9th Cir. 1991). Other courts of appeals have accepted that theory or refused to dismiss claims relying on it. See *Advanced Health-Care Servs.* v. *Radford Community Hosp.*, 910 F.2d 139, 149 & n.17 (4th Cir. 1990); *Kerasotes Mich. Theatres, Inc.* v. *National Amusements, Inc.*, 854 F.2d 135, 136 (6th Cir. 1988). This Court appeared to put the theory to rest by holding that unilateral conduct violates Section 2 "only when it actually monopolizes or dangerously threatens to do so." *Spectrum Sports* v. *McQuillan*, 506 U.S. 447, 459 (1993).

Numerous federal courts have applied *Spectrum Sports* to reject monopoly leveraging claims, reasoning that a "competitive advantage" in the second market does not violate Section 2 because it represents neither actual monopolization nor the dangerous threat required for attempted monopolization. *E.g.*, *Bepco, Inc.* v. *Allied-Signal, Inc.*, 106 F. Supp. 2d 814, 833 (M.D.N.C. 2000);

Spruce Oil Corp. v. *Archer-Daniels-Midland Co.*, 870 F. Supp. 1005, 1007 (D. Colo. 1994). See generally Joseph Kattan, *The Decline of the Monopoly Leveraging Doctrine*, 9-Fall ANTITRUST 41 (1994). The court below ruled otherwise, without explaining why it failed to follow this Court's reasoning in *Spectrum Sports*. Indeed, the panel's view that attempted monopolization is "derivative" of monopoly leveraging (Pet. 31a n.13) turns *Spectrum Sports* on its head.

These inter-circuit conflicts over the essential facilities and monopoly leveraging theories demand immediate resolution. District courts in over a dozen cases nationally have addressed the scope of the antitrust laws on claims similar to respondent's and reached conflicting rulings. See *supra* n.2. Given the frequency with which disputes arise under thousands of inter-carrier agreements, and given the authorization of the court below for class action lawyers to file claims on behalf of anyone with a telephone, it is certain that the many class actions already generated by *Trinko* are but a small preview of the new litigation burden that will confront the federal courts. The importance of the telecommunications industry to the nation's economy makes it intolerable that identical conduct by carriers with multi-state operations may be an antitrust violation in some parts of the country but not others. This Court's guidance is required to put an end to the waste of private and judicial resources as these issues are debated again and again with inconsistent results.

II. THE COURT BELOW DISREGARDED ESTABLISHED LIMITS ON THE SCOPE OF THE ANTITRUST LAWS.

By endorsing the viability of antitrust lawsuits challenging incumbents' affirmative assistance to competing carriers, the court below created a new category of expansive antitrust duties, improperly extended the

narrow essential facilities doctrine, revived the discredited monopoly leveraging theory of *Berkey Photo*, and discarded established principles of antitrust standing.

The fundamental premise of antitrust law is that vigorous competition, not compelled sharing of resources, yields output and prices that optimally benefit consumers. See *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 767-768 (1984). As the Seventh Circuit recognized in *Goldwasser*, 222 F.3d at 400, antitrust law does not generally impose "affirmative duties to help one's competitors," even on a monopolist. Prior to the 1996 Act, no antitrust court would have required a firm to give up profitable retail sales by selling at substantial discounts to competing retailers. See *Verizon Communications*, 122 S. Ct. at 1681 (competitor access to network facilities was "something brand new under the 1996 Act"). As the 1996 Act's antitrust savings clause makes clear, Congress's policy decision to include such a novel requirement in the Act did not "modify" these established limits on antitrust law. 110 Stat. 56, 143, § 601(b)(1), reprinted as note to 47 U.S.C. § 152. Nevertheless, according to the court below, the essential facilities doctrine permits Verizon's alleged "delay" in affirmatively assisting AT&T to serve as the predicate for an antitrust claim.

This Court has "never adopted" the essential facilities doctrine, *AT&T* v. *Iowa Utils. Bd.*, 525 U.S. 366, 428 (1999) (Breyer, J., concurring), and "scholars have raised very serious questions about the wisdom of the essential facilities doctrine as a justification for judicial mandates of competitor access." *United States Telecom Ass'n* v. *FCC*, 290 F.3d 415, 427 n.4 (D.C. Cir. 2002). But even if valid, the essential facilities theory has been narrowly confined because forced access "discourages firms from developing their own alternative inputs" and is more likely to stunt than promote competition. 3A Areeda & Hovenkamp,

ANTITRUST LAW ¶ 771, at 172 (2d ed. 2002); see *Blue Cross* v. *Marshfield Clinic*, 65 F.3d 1406, 1412-1413 (7th Cir. 1995). This risk of undermining the bedrock purpose of the antitrust laws—spurring investment and innovation so as to lower producer costs and consumer prices—counsels against expanding this problematic and controversial doctrine. See *Intergraph* v. *Intel*, 195 F.3d 1346, 1357-1358 (Fed. Cir. 1999) ("an unwarranted extension" of essential facilities doctrine risks harm to competition); *Alaska Airlines*, 948 F.2d at 542-546.

Moreover, as Justice Breyer has observed, "[e]ven the simplest kind of compelled sharing * * * means that someone must oversee the terms and conditions of that sharing." *Iowa Utils. Bd.*, 525 U.S. at 428. Application of the essential facilities doctrine to an ILEC's performance would require *judicial* supervision of such technical industry issues as computerized order processing, switching mechanisms, network component unbundling, and loop and trunk provisioning. Such "intensely practical difficulties" are best left to the expert regulators. *Verizon Communications*, 122 S. Ct. at 1668.

The court below improperly relied on *Otter Tail Power* v. *United States*, 410 U.S. 366 (1973), and *Aspen Skiing* v. *Aspen Highlands Skiing*, 472 U.S. 585 (1985). Pet. App. 29a, 34-35a. The regulatory statute at issue in *Otter Tail* gave the Federal Power Commission "no authority" to order a utility to transmit electric power over its transmission lines to requesting municipalities. 410 U.S. at 375. The 1996 Act, however, authorizes the state commissions (with FCC back-up) to oversee ILECs' treatment of CLECs. There is no precedent for bringing out the heavy artillery of antitrust to compel the very same affirmative assistance that Congress directed state and federal agencies to regulate. In industries subject to extensive regulation, "relief for arbitrary refusals to deal

should be left to common law remedies or to new legislation.* * * It is well within the province of the courts in determining the scope of § 2 to leave such matters to them." 3 Areeda & Turner, ANTITRUST LAW ¶ 736e, at 275-276 (1978).

This is not a "no access" case, such as *Aspen Skiing*, where the defendant totally deprived an existing joint venturer of access to a critical source of business for no legitimate reason. AT&T continues to use Verizon's facilities and services to compete. Failure to perform as quickly as AT&T may demand is not denial of access to an essential facility. See *Ideal Dairy Farms* v. *John Labatt, Ltd.*, 90 F.3d 737, 748 (3d Cir. 1996) (operational business that utilized defendant's premises "was not denied use of [defendant's] facilities"). And no court ever has relied on the essential facilities doctrine to require a firm to provide services to rivals at prices substantially below what it would charge consumers for those same services.

The second ground on which the court below authorized respondent's antitrust claim to proceed, the *Berkey Photo* version of monopoly leveraging, also conflicts with established limits on antitrust law. Far from precluding dominant firms from seeking a "competitive advantage" in other markets, as the *Berkey Photo* theory holds, antitrust law encourages "dominant firms to engage in vigorous competition." *Cargill, Inc.* v. *Monfort of Colo., Inc.*, 479 U.S. 104, 116 (1986). Firms may seemingly obtain an "unfair" advantage through innovations and efficiencies that benefit consumers. But the antitrust laws "do not create a federal law of unfair competition." *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993); accord *Hunt* v. *Crumboch*, 325 U.S. 821, 826 (1945) (affirming dismissal of antitrust claims alleging unfair treatment of contracting party).

The Second Circuit's revival of this discredited monopoly leveraging theory was particularly inappropriate because it makes unlawful a purported monopolist's use of its power in wholesaling to create a competitive advantage in retailing. That is simply vertical integration, which provides efficiencies that benefit consumers. It is virtually always lawful under the antitrust laws for a firm to sell what it makes, even if it does so exclusively and disadvantages unintegrated rivals. See *State Oil Co.* v. *Khan*, 522 U.S. 3, 15 (1997); 3A Areeda & Hovenkamp, ANTITRUST LAW ¶¶ 755-759. Thus, the leveraging doctrine has been limited to complementary markets, as in *United States* v. *Griffith*, 334 U.S. 100 (1948), and *Berkey Photo* itself. Under *Trinko*, a manufacturer that vertically integrates into retailing would violate section 2 merely by giving itself a competitive advantage over independent retailers—thereby condemning the very kind of cost savings that the antitrust laws encourage.

The court below not only extended antitrust liability beyond established boundaries, but authorized millions of telephone customers to litigate such novel claims. This Court has made clear that "Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property." *Associated Gen. Contractors* v. *California Council of Carpenters*, 459 U.S. 519, 535 (1983). Principles of antitrust standing accordingly incorporate such "proximate cause" factors as the directness of the asserted injury, the existence of more directly affected parties, and the speculativeness of the asserted harm. *Id.* at 540-542. The 1996 Act's antitrust savings clause preserves these limitations on the standing of telephone end-users to bring indirect claims under the antitrust laws.

Competing carriers have the incentive and expertise to vindicate their own interests, as well as a "more direct" stake than their customers in the issues raised by respondent. *Associated Gen.*, 459 U.S. at 545; see also *Holmes* v. *SIPC*, 503 U.S. 258, 269-270 (1992). Telephone end-users are poorly positioned to evaluate how ILECs process orders from CLECs or the many other technical details of inter-carrier cooperation. Congress therefore authorized CLECs to compel ILECs to engage in bilateral negotiation and arbitration over their respective rights and duties and to seek review and enforcement in specialized administrative and judicial proceedings. The CLECs have not been shy about doing so, initiating thousands of such regulatory and judicial proceedings all over the country. In these circumstances, respondent's antitrust allegations cannot provide it with standing to litigate issues from which it is remote and about which it can only speculate.

These considerations apply with particular force to a section 2 claim under the essential facilities theory. Prior to the ruling below, courts granted standing to bring an essential facilities claim only to the party allegedly denied access, not to third-party consumers. See *Credit Chequers* v. *CBA*, 1999 WL 253600, at *12 n.18 (S.D.N.Y. 1999) ("The essential facility doctrine is only available to competitors, not to customers"), aff'd, 205 F.3d 1322 (2d Cir. 2000) (table). Far from raising an essential facilities claim, the quality of an end-user's telephone service is precisely the kind of issue that state commissions have resolved for nearly a century.

Consumer standing is particularly unnecessary and counterproductive in this type of case because the CLECs themselves hold the keys to resolving any ILEC misconduct. Respondent's carrier, AT&T, took full advantage of the 1996 Act's regulatory machinery to resolve its grievances with Verizon, obtaining a consent

decree and millions of dollars in damages. Pet. App. 5a. Respondent's antitrust complaint raises the very same issues resolved by the consent decree and alleges injury that is entirely derivative of the injury previously asserted by AT&T. The AT&T-Verizon settlement would mean little if Verizon now must defend against virtually identical claims filed by any of millions of telephone consumers.

The Second Circuit's reliance on *Blue Shield* v. *McCready*, 457 U.S. 465 (1982), to justify antitrust standing in this case was misplaced. In *McCready*, as this Court later explained, the plaintiff was "the *direct* victim of unlawful coercion" by the defendant health plan, which had refused her request for reimbursement. *Associated Gen.*, 459 U.S. at 540 n.44 (emphasis added). In contrast, the plaintiff in *Associated General* was not "a direct victim of the defendants' coercive practices" and thus did not have standing. *Ibid.* Here, too, respondent was not a "direct victim" of Verizon's alleged mistreatment of AT&T and likewise lacks standing to bring derivative antitrust claims. See *Jeffrey* v. *Southwestern Bell*, 518 F.2d 1129, 1130-1132 (5th Cir. 1975) (telephone consumers lacked standing to assert antitrust claims against local telephone company for allegedly mistreating other firms); *United States* v. *Western Elec. Co.*, 900 F.2d 283, 310 (D.C. Cir. 1990) (rejecting grant of antitrust standing to "any consumer" of telecommunications services).

These concerns are confirmed by the extraordinary proliferation of class action litigation that has come in the wake of the decision below.[3] A cottage industry is rapidly

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[3] Class actions recently filed on these issues in the last 3 months include *Sandra's Parkside Florist* v. *Bell Atl.*, No. 02-6907 (S.D.N.Y.); *Leider* v. *Bell Atl.*, No. 02-7034 (S.D.N.Y.); *Birnbaum* v. *Bell Atl.*, No. 02-7294 (S.D.N.Y.); *Bartolini Ice Cream* v. *Bell Atl.*, No. 02-7426 (S.D.N.Y.); *Schine* v. *SBC*, No. 302-1624 (D.

developing within the class action bar devoted to monitoring disputes between ILECs and CLECs and racing into court with antitrust complaints that demand treble damages and attorneys' fees. Given the technical complexity of these disputes, such class litigation truly would be a "Frankenstein monster posing as a class action." *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 169 (1974). Simply responding to discovery demands would absorb thousands of hours of attorney time. The *in terrorem* effect of these treble-damages class actions will force costly settlements, regardless of the strength of the consumer claims, while discouraging settlements between ILECs and CLECs, such as the settlement between Verizon and AT&T that set the stage for this litigation.

Conn.); *Twombly* v. *SBC*, No. 302-1617 (D. Conn.); *Marcus* v. *Bell Atl.*, No. 02-7435 (S.D.N.Y.); *Srulowitz* v. *Bell Atl.*, No. 02-7437 (S.D.N.Y.); *Superior Jewelry* v. *Bell Atl.*, No. 02-7528 (S.D.N.Y.); *Syncro Servs.* v. *Bell Atl.*, No. 02-7650 (S.D.N.Y.); *Limage* v. *Bell Atl.*, No. 02-7716 (S.D.N.Y.); *Wager* v. *Bell Atl.*, No. 02-7746 (S.D.N.Y.); *Blake* v. *Bell Atl.*, No. 02-7855 (S.D.N.Y.); *Brooks Sumberg* v. *SBC*, No. 302-1787 (D. Conn.); *Etherington* v. *SBC*, No. 302-1801 (D. Conn.); *Dillon* v. *SBC*, No. 302-1811 (D. Conn.); *Feder* v. *SBC*, No. 302-1809 (D. Conn.); *Artie's Auto Body* v. *SBC*, No. 302-1858 (D. Conn.); *Connecticut Tel. & Comm.* v. *SBC*, No. 302-1887 (D. Conn.); *Korab's Truck* v. *SBC*, No. 302-1919 (D. Conn.); *Maury* v. *BellSouth*, No. 02-2729 (N.D. Ga.); *Gwinnett Sound* v. *BellSouth*, No. 02-2743 (N.D. Ga.); *Finnell* v. *BellSouth*, No. 02-2842 (N.D. Ga.); *Treasure Coast* v. *BellSouth*, No. 02-2835 (N.D. Ga.); *Gerber* v. *BellSouth*, No. 02-2858 (N.D. Ga.); *Olshein* v. *BellSouth*, No. 02-61505 (S.D. Fla.); *Dynamic Network* v. *BellSouth*, No. 02-2926 (N.D. Ga.); *Konis* v. *BellSouth*, No. 02-2936 (N.D. Ga.); *Starr Sys.* v. *Bell Atl.*, No. 02-3706 (D. Md.); *Vacation Tan & Travel* v. *Qwest*, No. 02-1978 (D. Colo.); *Spa Universaire* v. *Qwest*, No. 02-1977 (D. Colo.). In a December 9, 2002 filing in *Twombly*, *supra*, respondent's counsel recognized the Circuit split when he represented that "none of us would be here but for *Trinko* and after *Goldwasser*."

These are not issues that must await discovery and the compilation of a summary judgment record. Allowing these costly and burdensome cases to lumber forward through discovery and possibly to trial would conflict with this Court's admonition that courts should dismiss deficient antitrust claims at the pleading stage rather than allow "a potentially massive factual controversy to proceed." *Associated Gen.*, 459 U.S. at 528 n.17. As recognized in *Goldwasser*, this type of case does not raise "the kind of question that requires further development of a factual record" beyond the usual range of judicial notice. See also 2 Areeda et al., ANTITRUST LAW ¶ 307c, at 68, 71 (2d ed. 2000) (claims of a duty to deal and monopoly leveraging present questions of legal "policy, not of fact").

III. THE DECISION BELOW CONFLICTS WITH CONGRESS'S INTENT THAT EXPERT REGULATORS, NOT ANTITRUST JURIES, RESOLVE INTER-CARRIER DISPUTES.

Despite the obvious importance of reconciling the telecommunications and antitrust statutes, the court below failed to follow this Court's approach to evaluating the relationship between regulatory statutes and the antitrust laws. *E.g.*, *United States* v. *Citizens & S. Nat'l Bank*, 422 U.S. 86, 91 (1975) (when applying the antitrust laws, "careful account must be taken of the pervasive federal and state regulation characteristic of the industry"). In these types of cases, this Court analyzes the regulatory scheme as a whole and the type of conduct challenged to effectuate the intent of Congress and to gauge the practical consequences for effective regulatory supervision. *E.g.*, *Gordon* v. *New York Stock Exch.*, 422 U.S. 659, 663 (1975); *Pan Am. World Airways* v. *United States*, 371 U.S. 296, 305 (1963); *Hughes Tool Co.* v. *TWA*, 409 U.S. 363, 387 (1973); *National Gerimedical Hosp.* v. *Blue Cross*, 452 U.S. 378, 393 n.18 (1981). This Court long has

recognized that expert agencies often "are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure" to resolve intra-industry disputes. *Far East Conf.* v. *United States*, 342 U.S. 570, 574-575 (1952); Sullivan & Grimes, THE LAW OF ANTITRUST § 14.5, at 746 (2000) (listing cases).

Resolving inter-carrier disputes through antitrust suits is contrary to the intent of Congress. The 1996 Act's "novel" regulatory scheme "broadly extended [federal] law into the field of intrastate telecommunications," with the FCC overseeing national policies and state commissions playing the central role in "specified areas," including "interconnection agreements." *Iowa Utils. Bd.*, 525 U.S. at 385 n.10. The Second Circuit's extension of the antitrust laws to reach consumer complaints over the details of carrier resale and interconnection is inconsistent with Congress's decision to entrust local carrier disputes to expert regulators. Even before the 1996 Act, it had "become clear that comprehensive regulation of the rapidly advancing telecommunications markets was not a task well suited to the federal courts." *Goldwasser*, 222 F.3d at 393. Government by antitrust decree is even less suitable now, after the Act has given expert agencies the "power to prevent or control the challenged conduct." 1A Areeda & Hovenkamp, ANTITRUST LAW ¶ 243f, at 57 (2d ed. 2000).

The Second Circuit's endorsement of parallel state PSC and antitrust court proceedings risks subjecting affected parties to "duplicative and inconsistent standards." *United States* v. *NASD*, 422 U.S. 694, 735 (1975); *Gordon*, 422 U.S. at 689. Lay juries will be asked to apply general antitrust criteria to conduct subject to the specific regulatory standards in the 1996 Act, second-guess expert agency decisions (such as the FCC and PSC orders that resolved the customer order issue raised in

respondent's complaint), apply the Second Circuit's "reasonableness" standard to exceptionally complex and technical issues, and do all this based on a case filed on behalf of nominal plaintiffs with no direct involvement in the resale or interconnection process.

As explained in *Goldwasser*, 222 F.3d at 401, antitrust resolution of claims like those raised here is not "compatible" with the 1996 Act's remedial regime. That regime is based on good-faith negotiations and private agreements in which the carrier parties set the terms. See *Brown* v. *Pro Football, Inc.*, 518 U.S. 231, 242 (1996) (antitrust laws should not be expanded in a manner that disrupts good-faith bargaining governed by federal regulation). Here, Verizon and AT&T specified ADR procedures as their "exclusive remedy" in the event of a dispute. Pet. App. 5a. The 1996 Act procedures would become a dead letter if AT&T's customers could file court claims based on that same dispute, engage in lengthy antitrust litigation, and years later obtain a jury verdict at odds with the administrative ruling. In analogous situations, courts have "equitably estopped" nonsignatory third parties from evading a contract's binding arbitration provision when they seek judicial enforcement of obligations arising under a contract with such a provision. *E.g.*, *International Paper* v. *Schwabedissen Maschinen & Anlagen*, 206 F.3d 411, 418 (4th Cir. 2000). Congress never intended to permit third-party consumers to nullify the 1996 Act's remedial scheme by filing antitrust lawsuits over the details of carrier relationships that already are scrutinized by expert regulators and implemented through ADR procedures in inter-carrier agreements. See *Howsam* v. *Dean Witter Reynolds*, No. 01-800, slip op. 6 (U.S. Dec. 10, 2002) (the law presumes alignment of decisionmaker and "comparative expertise" to enable "a fair and expeditious resolution of the underlying controversy").

The Second Circuit denied that there is any risk of a "conflict with the regulatory framework" from an action for damages, as opposed to injunctive relief. Pet. App. 38-39a. But it is well established that "regulation can be as effectively exerted through an award of damages as through some form of preventive relief." *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959). Allowing consumers to bring treble damage class actions based on CLEC grievances about ILEC provisioning will have the same disruptive effect as a judicial injunction.

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The exceptional public importance of clear legal rules in the wake of Congress's overhaul of federal telecommunications legislation already has prompted this Court to grant several petitions for certiorari in recent terms. See *Verizon Md., Inc.* v. *Public Serv. Comm'n*, 122 S. Ct. 1753 (2002); *Verizon Communications Inc.* v. *FCC*, 122 S. Ct. 1646 (2002); *AT&T* v. *Iowa Utils. Bd.*, 525 U.S. 366 (1999). The Second Circuit's creation of novel antitrust duties and unfettered consumer standing to enforce them makes this case even more significant in its legal and economic implications than the decisions previously reviewed by this Court. At bottom, the issues raised in the petition concern the proper legal framework for resolving the complex disputes between incumbent and competing carriers that arise on a daily basis. Only this Court can provide the clear national rule urgently needed by the divided lower courts and market participants.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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